

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
SYLVESTER SAM DAVE  
  
Defendant.

NO. CR-99-2067

**ORDER DENYING DEFENDANT'S RULE  
35 MOTION TO RECONSIDER THE  
SENTENCE**

Before the Court, without oral argument, is Defendant Sylvester Sam Dave's Rule 35 Motion to Reconsider the Sentence. (Ct. Rec. 113.) After reviewing the submitted material and relevant authority, the Court is fully informed and denies Defendant's motion. The reasons for the Court's Order are set forth below.

**I. Background**

On August 12, 1999, Defendant pleaded guilty to Aggravated Sexual Abuse of a Minor, violating Title 18, United States Code §§ 1153 and 2241(c) (Ct. Rec. 32) and was sentenced to eighty-seven (87) months imprisonment, five (5) years supervised release, no fine, and \$1,566.16 in restitution (Ct. Rec. 42).

1 On September 14, 2007, an arrest warrant was issued for Defendant  
2 because he allegedly committed nine (9) supervised release violations.  
3 (Ct. Rec. 99.) Defendant appeared before the Court on November 20, 2007,  
4 and admitted to four (4) violations, including testing positive for  
5 cocaine. Both Plaintiff and Defendant agreed that twenty-four (24)  
6 months imprisonment was appropriate so that Defendant would be eligible  
7 to participate in the Bureau of Prison's ("BOP") Residential Drug and  
8 Alcohol Program ("RDAP").

9 The Court explicitly questioned counsel whether twenty-four (24)  
10 months imprisonment would be a sufficient length of time for Defendant  
11 to qualify for and complete the BOP's RDAP; defense counsel responded she  
12 was "pretty confident" twenty-four (24) months would be sufficient. The  
13 Court then informed Defendant that, while it is clear he desperately  
14 needs treatment, the Court did not want to inflict a greater punishment  
15 than necessary based on defense counsel's mistaken belief that he would  
16 qualify for RDAP with a twenty-four (24) month sentence. Here the  
17 Court's implied concern was that additional imprisonment carried the risk  
18 of assault by other inmates due to the nature of Defendant's original  
19 crime and physical stature.

20 After the supervised release revocation hearing, Defendant filed the  
21 motion now before the Court, entitled "Rule 35 Motion to Reconsider the  
22 Sentence." (Ct. Rec. 113.)

23 After receiving Defendant's motion, the Court requested that United  
24 States Probation Officer Jose Vargas contact the federal prison in  
25 Sheridan, Oregon; he was advised that prisoners serving twenty-four (24)  
26 months at Sheridan were highly likely to be admitted to RDAP.

## II. Discussion

Defendant argues that (1) while he is technically eligible for the BOP's RDAP, a BOP information specialist recently informed defense counsel that twenty-four (24) months imprisonment may be an insufficient amount of time for Defendant to be admitted into the RDAP; and (2) the Court improperly sentenced him to twenty-four (24) months imprisonment because 18 U.S.C. § 3582(a) prohibits sentencing judges from imposing sentence lengths to allow for rehabilitation. (Ct. Rec. 114 at 2-3.) The Government responds that correcting the sentence is unnecessary because there is no clear error. (Ct. Rec. 118.)

Federal Rule of Criminal Procedure 35 governs correcting sentences and states, in pertinent part:

(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

FED. R. CRIM. P. 35(a).

### A. Motion Type

As an initial matter, Defendant's motion as styled is unknown to the Court; the Court nevertheless construes it as a notice that it might have committed a technical and/or clear error when sentencing Defendant.<sup>1</sup>

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<sup>1</sup>In *United States v. Jimenez*, 2007 Lexis 46155 (E.D. Cal. June 26, 2007), the court held, *inter alia*, that Federal Rule of Criminal Procedure 35 only provides sentence relief upon the Government's motion or a *sua sponte* motion by the Court. The Court respectfully disagrees; counsel are encouraged to bring to the Court's attention any technical or clear error that requires Court action under Rule 35.

1 **B. Timing**

2 Defendant was sentenced on November 20, 2007. (Ct. Rec. 110.) As  
3 stated, a Court must correct a clear sentencing error within seven days  
4 (excluding, under Federal Rule of Criminal Procedure 45(a), weekends and  
5 holidays). FED. R. CRIM. P. 35(a) & 45(a). Accordingly, the Court has  
6 until November 30, 2007, to take action under Federal Rule of Criminal  
7 Procedure 35.

8 **C. Clear Error**

9 In support of his argument that the Court improperly sentenced  
10 Defendant, Defendant relies exclusively on *United States v. Manzella*, 475  
11 F.3d 152, 162 (3d Cir. 2007), which states, "18 U.S.C. § 3582(a)  
12 prohibits a sentencing court from effecting the rehabilitative goals of  
13 18 U.S.C. § 3553(a)(2)(D) either in sentencing or, if a term of  
14 imprisonment is otherwise to be imposed, in determining the length of  
15 that term."

16 Defendant's reliance on *Manzella*, however, is misplaced. *Manzella*  
17 involved a sentencing court considering rehabilitative goals such as the  
18 BOP's RDAP when determining the defendant's *initial* sentence. 475 F.3d  
19 at 155. This is separate from and different than a sentencing court  
20 considering rehabilitative goals when revoking a defendant's supervised  
21 release. In fact, the Second, Tenth, and Eleventh Circuits have held  
22 that sentencing courts can consider rehabilitative goals to determine the  
23 length of the sentence to impose following revocation of supervised  
24 release because the revocation of supervised release is governed by 18  
25 U.S.C. §§ 3583(e) and (g), which mandate consideration of § 3553(a), but  
26 not § 3582(a). See *United States v. Anderson*, 15 F.3d 278

1 (2d. Cir. 1994) (recognizing that rehabilitative needs will bear on the  
2 length of incarceration following permissive revocation of supervised  
3 release); *United States v. Tsosie*, 376 F.3d 1210 (10th Cir. 2004)  
4 (holding that Congress intended § 3582(a)'s limitations to apply only  
5 when a court is initially imposing a sentence); *United States v. Brown*,  
6 224 F.3d 1237 (11th Cir. 2000) (finding that § 3582(a)'s prohibitions  
7 apply to an initial sentencing but not probation and supervised  
8 release).<sup>2</sup>

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11       <sup>2</sup>The Ninth Circuit has held, contrary to the Second, Third, and  
12 Eleventh Circuits, that § 3582 does not prohibit a sentencing court from  
13 considering rehabilitation in determining the length of imprisonment once  
14 imprisonment is chosen as a punishment. *United States v. Duran*, 37 F.3d  
15 557 (9th Cir. 1994). *Manzella* criticizes *Duran* because *Duran* is based  
16 on a textual analysis of § 3582, and "the plain language of § 3582(a) in  
17 fact does extend its prohibition to a court's determination of "the  
18 length of the sentence." 475 F.3d at 159; see 18 U.S.C. § 3582(a) ("The  
19 court, in determining whether to impose a term of imprisonment, and, if  
20 a term of imprisonment is to be imposed, in determining the length of the  
21 term, shall consider the factors set forth in section 3553(a) . . .  
22 recognizing that imprisonment is not an appropriate means of promoting  
23 correction and rehabilitation." (emphasis added)). Whatever the merits  
24 of *Duran's* § 3582 textual analysis, its holding is inapplicable here  
25 because it involved an initial sentencing, not a revocation of supervised  
26 release. 37 F.3d at 559.

1 Because § 3582(a) does not apply to permissive revocation of  
2 supervised release, it was permissible for the Court to consider  
3 Defendant's rehabilitative needs in imposing a twenty-four (24) month  
4 sentence. To be sure, the Court recognizes that admission to the RDAP  
5 is within the BOP's discretion. But the Court imposed a sentence outside  
6 the four (4) - ten (10) month guideline range primarily because it  
7 believed there was a high probability that Defendant would be admitted  
8 to RDAP, a program he desperately needs.

9 In arriving at a twenty-four (24) month sentence, the Court weighed  
10 Defendant's serious need for an alcohol treatment program against his  
11 risk of being assaulted by other inmates due to the nature of his  
12 original crime and physical stature. With a high probability that  
13 Defendant will be admitted to RDAP if he is placed at an eligible  
14 facility, the former consideration prevails. The Court concludes it did  
15 not commit clear error in sentencing Defendant to twenty-four (24) months  
16 imprisonment.

### 17 III. Conclusion

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Defendant's Motion for Expedited Hearing and to Shorten Time on  
20 Notice on Motion to Correct Under Rule 35 (**Ct. Rec. 115**) is **GRANTED**.

21 2. Defendant's Rule 35 Motion to Reconsider the Sentence  
22 (**Ct. Rec. 113**) is **DENIED**.

23 3. The Court treats Defendant's motion as notice of a Rule 35  
24 error, *sua sponte* considers Defendant's twenty-four (24) month sentence  
25 in prison, and concludes it did not commit clear error.

1       **IT IS SO ORDERED.** The District Court Executive is directed to enter  
2 this Order and provide copies to counsel, the U.S. Probation Office, and  
3 the U.S. Marshals.

4       **DATED** this    29<sup>th</sup>      day of November, 2007.

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6                               S/ Edward F. Shea  
7                               EDWARD F. SHEA  
                              United States District Judge

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